

ASSEMBLY BILL

No. 1162

Introduced by Assembly Member Mullin

February 22, 2005

An act to amend Section 17406 of, and to add and repeal Article 2.2 (commencing with Section 17429.1) of Chapter 4 of Part 10.5 of, the Education Code, relating to school facilities.

LEGISLATIVE COUNSEL'S DIGEST

AB 1162, as introduced, Mullin. School facilities: lease-leaseback contracts.

Existing law authorizes the governing board of a school district, without advertising for bids, to let, for a minimum rental of \$1 a year, to any person, firm, or corporation any real property belonging to the school district if the lease instrument provides for the construction of a building or buildings for the use of the school district during the term of the lease and provides that title to the building will vest in the school district at the expiration of the lease term.

This bill would delete the authority for these leases to be let without the governing board advertising for bids and would instead require these leases to be let through a competitive proposal process.

This bill would establish the competitive proposal process for the above-mentioned leases. The bill would authorize the governing board of a school district to enter into a lease-leaseback contract, as defined, until January 1, 2010. The bill, among other things, would impose certain requirements relating to requests for proposals, require certain information to be verified under oath, require the school district to establish procedures for final proposal selection, and set forth bonding and performance requirements. This bill, by requiring verification to

be made under penalty of perjury, would create a new crime and thereby impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. It is the intent of the Legislature to enable
2 school districts to lease real property for the purpose of
3 acquiring, financing, designing, or constructing school facilities
4 through a competitive proposal process.

5 SEC. 2. Section 17406 of the Education Code is amended to
6 read:

7 17406. (a) ~~Notwithstanding~~ *In order to enable school*
8 *districts to let real property for the purpose of acquiring,*
9 *financing, or constructing facilities, and notwithstanding Section*
10 *17417, the governing board of a school district, without*
11 ~~advertising for bids~~ *through the competitive proposal process set*
12 *forth in Article 2.2 (commencing with Section 17429.1), may let,*
13 *for a minimum rental of one dollar (\$1) a year, to any person,*
14 *firm, or corporation any real property that belongs to the district*
15 *if the instrument by which such the property is let requires the*
16 *lessee therein to construct on the demised premises property, or*
17 *provide for the construction thereon of, a building or buildings*
18 *for the use of the school district during the term thereof, and*
19 *provides that title to that building shall vest in the school district*
20 *at the expiration of that term. The instrument may provide for the*
21 *means or methods by which that title shall vest in the school*
22 *district prior to the expiration of that term, and shall contain such*
23 *any other terms and conditions as the governing board may deem*
24 *to be in the best interest of the school district.*

25 (b) Any rental of property that complies with subdivision (a)
26 shall be deemed to have thereby required the payment of

adequate consideration for purposes of Section 6 of Article XVI of the California Constitution.

SEC. 3. Article 2.2 (commencing with Section 17429.1) is added to Chapter 4 of Part 10.5 of the Education Code, to read:

Article 2.2. Lease-Leaseback Contracts

17429.1. As used in this article, the following terms have the following meanings:

(a) “Best value” means a value determined by objective criteria and may include, but need not be limited to, price, features, functions, financing terms, if applicable, and other criteria deemed appropriate by the school district.

(b) “Lease-leaseback” means a procurement process pursuant to a contractual arrangement executed in accordance with Section 17406 and this article.

(c) “Lease-leaseback contract” means a contract entered into pursuant to Section 17406 and this article.

(d) “Lease-leaseback entity” means a person, firm, corporation, or other association that is able to provide appropriately licensed preconstruction and construction services, as needed, pursuant to a contract entered into pursuant to Section 17406 and this article.

17429.2. (a) Upon a determination by the governing board of a school district that it is in the best interest of the school district, the governing board may enter into a lease-leaseback contract if, after evaluation of the traditional design, bid, and build process of school facility construction and of the lease-leaseback process in a public meeting, the governing board makes written findings that use of the lease-leaseback process on the specific project under consideration will accomplish one of the following objectives:

(1) Reduce comparable project costs.

(2) Expedite the completion of the project.

(3) Provide features not achievable through the traditional design-bid-build method.

(b) As an alternative to subdivision (a), the governing board of a school district may adopt a policy governing those circumstances in which the school district may contract for the construction of a building, as defined in Section 17400, utilizing

1 the contracting procedures set forth in Section 17406 and this
2 article. This policy shall require that the delegatee of the
3 governing board make a recommendation, at the time the project
4 is submitted to the governing board for contract approval in
5 accordance with subdivision (d) of Section 17429.3, in favor of
6 these contracting procedures on a specific project basis after
7 evaluation of the otherwise applicable design, bid, and build
8 process for school facility construction. This recommendation
9 shall include all of the following:

10 (1) A finding that use of the contracting procedures of Section
11 17406 will result in the best value to the school district.

12 (2) A description of the expected benefits to be derived, which
13 may include, but need not be limited to, reduction of project
14 costs, expedited completion of construction, or features or
15 benefits not achievable through the otherwise applicable
16 design-bid-build process.

17 17429.3. Lease-leaseback projects shall progress as follows:

18 (a) (1) (A) The school district shall prepare and issue a
19 request for proposal setting forth all of the following:

20 (i) A description of the project.

21 (ii) The expected cost range of the contract.

22 (iii) The time period for response to the request for proposal.

23 (iv) Project responsibilities and contract requirements.

24 (v) A description of all significant factors the school district
25 reasonably expects to consider as criteria in evaluating proposals.

26 (vi) The selection process to be employed by the school
27 district in evaluating proposals, including, without limitation, the
28 manner in which proposals shall be scored or weighted.

29 (vii) Any other information relevant to the proposal that is
30 required to be provided.

31 (B) The performance specifications and any plans shall be
32 prepared by a design professional duly licensed or registered in
33 this state to perform the services required by the Field Act, as
34 defined in Section 17281.

35 (2) The school district shall provide public notice of the
36 lease-leaseback request for proposal in accordance with Section
37 20112 of the Public Contract Code.

38 (3) Each request for proposal shall do all of the following:

39 (A) (i) Invite interested parties to submit competitive sealed
40 proposals in the manner prescribed by the school district.

1 (ii) The school district shall establish a procedure to prequalify
2 lease-leaseback entities, including using the questionnaire
3 developed by the Director of the Department of Industrial
4 Relations pursuant to subdivision (b) of Section 17250.25. The
5 questionnaire shall be used in good faith with the understanding
6 that provisions for inclusion of an architect or engineer, or both,
7 may not be relevant in all projects.

8 (iii) The information required pursuant to this subdivision
9 shall be verified under oath by the lease-leaseback entity and its
10 members in the manner in which civil pleadings in civil actions
11 are verified. Information required pursuant to this subdivision
12 that is not a public record pursuant to the California Public
13 Records Act (Chapter 3.5 (commencing with Section 6250) of
14 Division 7 of Title 1 of the Government Code) is not open to
15 public inspection.

16 (iv) Any architectural firm, engineering firm, construction
17 manager, contractor, subcontractor, consultant, or individual
18 retained by the governing body of the school district directly or
19 indirectly prior to the award of the project to assist in the
20 planning of the project is not eligible to participate in the
21 competition with the lease-leaseback entity or to perform work
22 on the project as a subcontractor if the entity or individual
23 participated in the preparation of the request for proposal or
24 determination of the selection criteria.

25 (B) Include a section identifying and describing all of the
26 following:

27 (i) All significant factors that the school district reasonably
28 expects to consider in evaluating proposals, which may include,
29 but are not limited to, cost or price of preconstruction services
30 such as value-engineering or constructability reviews,
31 construction, all nonprice related factors, and, if applicable, the
32 cost of financing. The request for proposal shall describe the
33 criteria required under subdivision (c).

34 (ii) The methodology and rating or weighting scheme that will
35 be used by the school district in evaluating competitive proposals
36 and specifically whether proposals will be rated according to
37 numeric or qualitative values.

38 (iii) The relative importance or weight assigned to each of the
39 factors identified in the request for proposal, including a

1 description of the criteria weighting required under subdivision
2 (c).

3 (iv) As an alternative to clause (iii), the school district shall
4 specifically disclose whether all evaluation factors, other than
5 cost or price, when combined, are any of the following:

6 (I) Significantly more important than cost or price.

7 (II) Approximately equal in importance to cost or price.

8 (III) Significantly less important than cost or price.

9 (v) If the school district governing board wishes to reserve the
10 right to hold discussions or negotiations with responsive
11 lease-leaseback entities, it shall so specify in the request for
12 proposal and incorporate into the request for proposal applicable
13 procedures to be observed by the school district.

14 (b) The school district shall establish a procedure for final
15 selection of the lease-leaseback entity. Selection shall be based
16 on the following criteria:

17 Notwithstanding any other provision of this code or of Section
18 20111 of the Public Contract Code, a school district may use a
19 lease-leaseback contract to construct a building, as that term is
20 defined in Section 17400, based upon performance and other
21 criteria set forth by the governing board in the solicitation of
22 proposals. Competitive proposals shall be evaluated by using the
23 criteria and source selection procedures specifically identified in
24 the request for proposal. Once the evaluation is complete, all
25 responsive lease-leaseback entities may be ranked from the most
26 advantageous to least advantageous to the school district. If a
27 school district chooses not to rank the lease-leaseback entities,
28 the contract shall be rebid pursuant to this article if the
29 lease-leaseback entity that was awarded the contract defaults or is
30 unable to perform.

31 (c) Proposals shall be evaluated and scored solely on the basis
32 of the factors and source selection procedures identified in the
33 request for proposal. However, the following minimum factors
34 shall each represent at least 10 percent of the total weight or
35 consideration given to all criteria factors: price, skilled labor
36 force availability, and acceptable safety record.

37 (d) The award of the contract shall be made to the responsible
38 lease-leaseback entity whose proposal is determined, in writing
39 by the school district, to be the best value to the school district.
40 The school district governing board shall issue a written decision

1 supporting its contract award and stating in detail the basis of the
2 award. The decision and the contract file shall be sufficient to
3 satisfy an external audit.

4 (e) Notwithstanding any provision of the Public Contract
5 Code, upon issuance of a contract award, the school district
6 governing board shall publicly announce its awards identifying
7 the lease-leaseback entity to whom the award is made, the
8 selected lease-leaseback entity's timeline for completion,
9 schoolsite, price proposal, as applicable, and, if applicable,
10 financing terms, and its overall combined rating on the request
11 for proposal evaluation factors.

12 (f) For the purposes of this article, "skilled labor force
13 availability" means that an agreement exists with a registered
14 apprenticeship program, approved by the California
15 Apprenticeship Council, which has graduated apprentices in each
16 of the immediately preceding five years. This graduation
17 requirement does not apply to programs providing apprenticeship
18 training for any craft that has not been deemed by the
19 Department of Labor and the Department of Industrial Relations
20 to be an apprenticable craft in the five years prior to January 1,
21 2006.

22 (g) For the purposes of this article, a lease-leaseback entity's
23 "safety record" shall be deemed "acceptable" if its experience
24 modification rate for the most recent three-year period is an
25 average of 1.00 or less, and its average total recordable injury or
26 illness rate and average lost work rate for the most recent
27 three-year period does not exceed the applicable statistical
28 standards for its business category, or if the lease-leaseback
29 entity is a party to an alternative dispute resolution system as
30 provided for in Section 3201.5 of the Labor Code.

31 17429.4. (a) Any lease-leaseback entity that is selected
32 pursuant to this article shall possess or obtain a payment bond
33 pursuant to Section 3247 of the Civil Code. A faithful
34 performance bond in the amount of 100 percent of the total price
35 of construction shall be provided in favor of the school district.

36 (b) Any payment or performance bond written for the
37 purposes of this article is encouraged to be written on a form
38 developed by the Department of General Services pursuant to
39 subdivision (g) of Section 14661 of the Government Code. The
40 purpose of the requirement of this subdivision is to promote

1 uniformity of bond forms to be used on school district
2 lease-leaseback projects throughout the state.

3 (c) (1) All subcontracts that are awarded by the
4 lease-leaseback entity for the school district's project shall be
5 awarded by the lease-leaseback entity in accordance with the
6 lease-leaseback process set forth by the school district in the
7 lease-leaseback package.

8 (2) The lease-leaseback entity shall do all of the following:

9 (A) Provide public notice of the availability of work to be
10 subcontracted in accordance with Section 20112 of the Public
11 Contract Code.

12 (B) Provide a fixed date and time on which the subcontracted
13 work will be awarded.

14 (3) Subcontractors bidding on contracts pursuant to this
15 subdivision shall be afforded the protections contained in
16 Chapter 4 (commencing with Section 4100) of Part 1 of Division
17 2 of the Public Contract Code.

18 (4) In a contract between the lease-leaseback entity and the
19 subcontractor, and in a contract between subcontractors, the
20 percentage of the retention proceeds withheld shall not exceed
21 the percentage specified in the contract between the school
22 district and the lease-leaseback entity. If the lease-leaseback
23 entity provides written notice to a subcontractor of the
24 lease-leaseback entity prior to, or at the time the bid is requested,
25 that a bond may be required and the subcontractor subsequently
26 is unable or refuses to furnish a bond to the lease-leaseback
27 entity, then the lease-leaseback entity may withhold retention
28 proceeds in excess of the percentage specified in the contract
29 between the school district and the lease-leaseback entity from
30 any payment made by the lease-leaseback entity to the
31 subcontractor.

32 17429.5. (a) The minimum performance criteria and design
33 standards, if applicable, established pursuant to this article by a
34 school district shall be adhered to by the lease-leaseback entity.
35 Any deviations from those standards may only be allowed by
36 written consent of the school district.

37 (b) The total price of the project may be negotiated by the
38 school district and the lease-leaseback entity.

39 (c) Each contract with a lease-leaseback entity shall provide
40 that no construction, improvement, renovation, or expansion of

1 any school facility pursuant to this article that requires
2 compliance with the Field Act shall commence prior to the
3 receipt of the written approval of the plans, as to the safety of
4 design and construction, from the Department of General
5 Services.

6 (d) The lease-leaseback entity is liable for building the facility
7 to specifications set forth in the lease-leaseback contract in the
8 absence of contractual language to the contrary.

9 17429.6. This article is in effect only until January 1, 2010,
10 and as of that date is repealed, unless a later enacted statute that
11 is enacted before January 1, 2010, deletes or extends that date.

12 SEC. 4. This act does not apply to contracts in effect, or to
13 any proposal received by a school district, prior to January 1,
14 2006. Unless expressly set forth in this act, nothing in this act is
15 intended to affect, expand, alter, or limit rights, requirements, or
16 remedies otherwise available at law.

17 SEC. 5. No reimbursement is required by this act pursuant to
18 Section 6 of Article XIII B of the California Constitution because
19 the only costs that may be incurred by a local agency or school
20 district will be incurred because this act creates a new crime or
21 infraction, eliminates a crime or infraction, or changes the
22 penalty for a crime or infraction, within the meaning of Section
23 17556 of the Government Code, or changes the definition of a
24 crime within the meaning of Section 6 of Article XIII B of the
25 California Constitution.